Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 296 OF 1979
GUNN CHIT TUAN J
22 FEBRUARY 1990

Civil Procedure — Judgment in default of defence — Amendment of — Slip rule — Discretion of court — Rules of the High Court 1980, O 2, O 15 & O 20

On 23 February 1979 the plaintiff filed a suit against the defendants as co-administrators of the estate of Lim Chooi Seng, for the sum of $793,116.13. The defendants' solicitors informed the plaintiff's solicitors that as a grant had not yet been extracted, the action was premature. However, the plaintiff proceeded to enter judgment in default of defence on 14 July 1979 against the defendants in their personal capacity. When the grant was finally extracted in 1983, the third defendant was replaced as co-administrator by one Lim Chin Joo. On 26 October 1984, the plaintiff applied to amend the judgment and all pleadings and documents filed by changing the name of the third defendant to that of Lim Chin Joo. The application was dismissed by the registrar. The plaintiff appealed.

Held, dismissing the plaintiff's appeal:

(1) The power of the court to allow an amendment under O 15 r 6 of the Rules of the High Court 1980 ('the Rules') is discretionary. Order 15 r 6 only applies to proceedings where the substitution of any of the parties to the cause or matter is made before final judgment.

(2) Order 2 r 1 of the Rules is also not relevant as this case is not concerned with non-compliance with the Rules but is a case which concerned a judgment wrongfully entered into according to the Rules. Neither does O 20 r 11 apply as this is not a case in which there has been a clerical mistake or error.

(3) When a plaintiff sues a defendant and has entered up a default judgment against him simpliciter the court cannot by the slip rule amend it to a form of judgment de bonis testatoris.

Cases referred to

1 *Savena Supramaniam Pillay* v *Tan Kah Chiat, Administrator of Tan Kong Liong* [1934] MLJ 133 (folld)
2 *Chinese Tin Mines Rehabilitation Loans Board* v *Chee Hoi Voon* [1958] MLJ 269 (folld)
3 *Tak Ming Co Ltd* v *Yee Sang Metal Supplies Co* [1973] 1 WLR 300 (refd)
4 *Navimprex Centrala Navala* v *George Moundreas & Co SA* (1983) 127 SJ 392 (refd)
5 *Re Gist* [1904] 1 Ch 398 (refd)
6 *Armitage* v *Parson* [1908] 2 KB 410 (refd)
7 *Re City Housing Trust Ltd* [1942] Ch 262 (refd)

Legislation referred to

Rules of the High Court 1980 O 2, O 15, O 20

D Morias for the appellant.
DP Naban for the respondents.

Cur Adv Vult

Gunn Chit Tuan J: On 23 February 1979, Shell Malaysia Trading Sdn Bhd ('the plaintiff') filed a suit against one Leong Yuet Yeng the administratrix, and Lim Chin Beng and Lim Chui Pher as the co-administrators of the estate of Lim Chooi Seng, deceased ('the defendants'), for a sum of $793,116.13 being a debt incurred and owed by the said deceased. A conditional appearance was entered for the defendants on 31 May 1979, without prejudice to an application to set aside the writ.

On 17 April 1979, Skrine & Co wrote to Shearn Delamore & Co, the plaintiff's solicitors, to say that they act on behalf of the proposed administratrix and administrators of the estate of the late Lim Chooi Seng. They also informed Shearn Delamore & Co that a grant in their clients' favour had not yet been extracted because of difficulties in finding sureties to give the administration bond. They pointed out that the action was premature and that their clients have been improperly sued. Further to another enquiry by Shearn Delamore & Co, Skrine & Co informed them that only a limited grant was extracted on 20 October 1977, to enable some of the assets of the estate to be dealt with, but no general grant has been extracted up to 23 April 1979. Shearn Delamore & Co replied that in their opinion the 'limitation applies only to the extent of the estate and not to the purpose for which these assets are to be applied'. They contended that the position of the administrators of the deceased's estate remained unchanged. Then on 14 July 1979, judgment was entered against the defendants as follows:

> Judgment in default of defence
>
> The defendants having appeared to the specially indorsed writ of summons herein and not having delivered any defence it is this day adjudged that the plaintiffs recover against the said defendants the sum of Ringgit Seven hundred and ninety three thousand one hundred and sixteen and sen thirteen only ($793,116.13) together with interest thereon at the rate of 6% per annum from the date hereof to the date of realization and Ringgit One hundred and twenty only ($120) costs.
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> Given under my hand and Seal of the Court this 14 July 1979.
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> sgd
> Senior Assistant Registrar
> High Court, Kuala Lumpur

On 26 October 1984, that is more than five years after entering the said judgment, the plaintiff applied by summons-in-chambers for the following orders:

> 1 The plaintiffs be given leave to amend the name of the third co-administrator from Lim Chui Pher to Lim Chin Joo (as administrators of the estate of Lim Chooi Seng, deceased) on the judgment given in default of defence against the defendants dated 14 July 1979 and on all pleadings and documents filed previously.
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> 2 That the cost of this application be costs in cause.

On 25 January 1985, the senior assistant registrar ordered that the plaintiff's application to amend the judgment given on 14 July 1979, be dismissed with costs. The plaintiff filed a notice of appeal to the judge in chambers on 28 January 1985. I heard the appeal on 13 January 1988, and dismissed the appeal with costs but allowed the plaintiff's application for further arguments in open court.

Mr Morais, counsel for the plaintiff conceded in open court that the form of the original judgment in default was against the defendants in their personal capacity. He then referred to his written submission which stated that O 15 r 6 of the Rules of the High Court ('the Rules') 1980 gave the court the power to order that Lim Chui Pher (who has ceased to be an administrator as a result of an order dated 21 June 1983) ceased to be a party and to add Lim Chin Joo as a defendant since he became a co-administrator.

But then Mr Morais referred to *Savena Supramaniam Pillay* v *Tan Kah Chiat, Administrator of Tan Kong Liang*[1] in which the Court of Appeal in Singapore held that once a judgment has been passed and entered the court has no jurisdiction to amend it under the 'slip order' section unless there has been an accidental slip in drawing up the judgment, or unless the judgment as drawn up does not correctly state what the court actually decided and intended. When a plaintiff who sues a defendant as administrator has entered up a default judgment against him simpliciter, the court has no jurisdiction by means of a 'slip order' to amend this to a form of judgment de bonis testatoris. Counsel conceded that that judgment was against his client's case but contended that that case, which was cited before the senior assistant registrar, was inapplicable because it relates only to an application to amend the judgment de bonis propriis to a judgment de bonis testatoris. He then pointed out that *Savena*'s case[1] was followed in *Chinese Tin Mines Rehabilitation Loans Board* v *Chee Hoi Voon*[2] in which case Syed Sheh Barakbah J (as he then was) in our High Court at Ipoh cited with approval and followed the Singapore Court of Appeal case of *Savena Supramaniam Pillay* v *Tan Kah Chiat, Administrator of Tan Kong Liang*.[1] Counsel also stated that because the judgment as it stood did not bind the estate of Lim Chooi Seng, it had to be amended and he contended that the court also had jurisdiction to allow such an amendment because of O 2 r 1 of the Rules, concerning the effect of non-compliance with the requirements of the said Rules.

It was also contended that since the plaintiff's application was one to amend the judgment, the court has the power to amend it pursuant to O 20 r 11 of the Rules which is as follows:

> 11 Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

Finally counsel also referred to *Tak Ming Co Ltd* v *Yee Sang Metal Supplies Co*[3] at p 304 and pointed out that the Privy Council in a judgment delivered by Lord Pearson was satisfied with the explanation given in that case and held that it could be said both that there was an accidental omission by the judge to order interest in his judgment and that there was an accidental omission by the counsel to ask for it. The court therefore held that under the slip rule an accidental omission by counsel could suffice to bring O 20 r 11 concerning the 'slip rule' in Hongkong into operation. The UK Court of Appeal case of *Navimprex Centrala Navala* v *George Moundreas & Co SA*[4] was also cited to show that under the slip rule default judgment for the wrong sum was allowed to be amended.

Mr DP Naban, counsel for the defendants, began by referring to an affidavit filed by an advocate and solicitor in the firm of Skrine & Co (encl 26) which exhibited all the relevant correspondence exchanged between the parties' solicitors during the period from April 1976 until December 1984. As stated above, according to those correspondence, it was pointed out to Shearn Delamore & Co that the administrators had not yet extracted their grant and that any action was premature. Shearn Delamore & Co however replied to Skrine & Co on 29 May 1979 that they were proceeding with the writ in the court which has been served on the defendants, and gave notice that should no appearance be entered within two days they would proceed to enter judgment by default which they did on 14 July 1979. On 17 November 1983, Skrine & Co wrote to Shearn Delamore & Co again to point out that when the judgment in default was obtained against the defendants, they did not have the grant of representation to the estate of the deceased and could not therefore be properly sued because they had no standing. As a grant of representation was finally obtained in 1983 the defendants therefore paid the principal sum of $793,116.13 to settle the plaintiff's claim. Skrine & Co however informed Shearn Delamore & Co on 31 January 1984 that the defendants' cheque of $793,116.13 in favour of the plaintiff was made without prejudice to the defendants' right to apply to court to have the judgment against them set aside in the event the plaintiff attempted to recover interest or costs pursuant to that judgment.

Mr Naban then referred to the plaintiff's summons-in-chambers dated 26 October 1984 (encl 10) and pointed out that it was not only an application to convert the judgment in default against the defendants in their personal capacity to a judgment against the estate of the deceased but was also an application to substitute one of the co-administrators by another co-administrator. He also stated that the new co-administrator would then have a judgment against him in his personal capacity without a chance to defend.

Counsel also referred to *Savena Supramaniam Pillay* v *Tan Kah Chiat, Administrator of Tan Kong Liang*[1] and emphasized that an appeal court in Singapore had held that when an action is brought against an administrator and judgment is entered against him simpliciter, that is merely a personal judgment against the defendant, the judgment creditor cannot obtain satisfaction out of the estate of the deceased nor can the judgment creditor apply to amend the personal judgment to a judgment de bonis testatoris. Counsel also contended that there is no provision in the Rules to allow a plaintiff to amend a judgment by substituting a defendant so that the new defendant

would be bound by a judgment already entered against the substituted defendant. He contended that O 20 r 5 only allowed a plaintiff to amend a writ to correct the name of a party by substituting a new party, provided that the court was satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause unreasonable doubt as to the identity of the persons intended to be sued. He then stated that O 20 r 11, that is, the slip rule only allows the correction of clerical mistakes in judgments or errors arising from any accidental slip or omission in judgments or orders.

As regards O 15 r 6, counsel contended that it only allowed the addition or substitution of the defendant but pointed out that under O 15 r 8 there is provision that when an order under O 15 r 6 has been made, the plaintiff must accordingly amend the writ and serve the amended writ on the new defendant and upon service the new defendant is given the right to enter an appearance. The new defendant shall not become a party until the amended writ has been served on him. He contended that O 15 r 6 must necessarily only apply to proceedings where the substitution of a defendant was made *before* final judgment. He also contended that O 15 r 6 could not apply to the plaintiff's application and that there would be serious prejudice and injustice to the new defendant, Lim Chin Joo, as the judgment was a personal judgment and not one against the estate. Moreover, the joinder of the new party as a defendant under O 15 r 6 when the claim against him is time-barred would be contrary to the rule of practice.

Counsel also contended that in the present case there was no question of making the court's meaning plain as the mind of the court had not been addressed to that judgment. It was the plaintiff's irregular act in entering a personal judgment against the defendants; that irregular act of the plaintiff had nothing to do with the act and intention (of the officer) of the court or the judge. Counsel also pointed out that in the present case not only was the judgment an irregular form of judgment but the plaintiff had wrongfully entered a judgment which was of a totally different species. Such an irregularity had been held not to be due to a mere clerical mistake nor an error arising from an accidental slip or omission in the judgment, and it therefore could not be corrected under the slip rule. There would be grave injustice to the defendants if they were to be bound by a judgment which was irregular and wrong and with an amendment made seven years later so as to preclude them from setting up such defence as they might have. Counsel for the defendants therefore contended that the plaintiff's application to amend the judgment entered on 14 July 1979 was erroneous and improper, and submitted that the plaintiff's appeal should be dismissed with costs.

As pointed out by counsel for the defendants, the plaintiff's application of 26 October 1984 (encl 10) was not only an application to convert the judgment in default against the defendants personally to a judgment in default against the estate of the deceased (de bonis testatoris) but was also an application to amend all the pleadings and documents filed and to substitute one of the co-administrators by another co-administrator. Order 15 r 6 of the Rules is a rule which is meant to prevent an action from being defeated by the misjoinder or non-joinder of plaintiffs or defendants and allows, subject to certain principles, for the addition, substitution or striking out of persons as plaintiffs, similarly of defendants, intervention of persons not parties to the action and for misnomer. But the power of the court to grant such amendment under that rule is discretionary and I agreed with counsel for the defendants that O 15 r 6 must necessarily only apply to proceedings where the substitution of any of the parties to the cause or matter was made *before* final judgment. In this case it did not apply as the plaintiff had already signed judgment in default of defence. The position would be different if the judgment in default had been set aside by the court at the instance of either party and the action was commenced afresh. Order 2 r 1 of the Rules was also not relevant or applicable to this case which was not concerned with the effect of non-compliance with the said Rules but was a case concerning a judgment in default wrongfully entered into according to the Rules. Finally, O 20 r 11 did not apply because I was satisfied after perusing the correspondence attached to the affidavit of the advocate and solicitor from the firm of Skrine & Co (encl 26) that this was not a case in which there has been a clerical mistake or error arising from an accidental slip or omission both by the officers of the court (*Re Gist*[5]) and the parties (*Armitage* v *Parsons*[6]) or a mistake in a date (*Re City Housing Trust Ltd*[7]). The error was not an error in expressing what the court intended at the time when the order was made. It was in fact a judgment in default of defence which was intentionally entered into by the plaintiff in all the circumstances of the case. Apart from the slip rule which did not apply in this case, I would, like Syed Sheh Barakbah J (as he then was) in *Chinese Tin Mines Rehabilitation Loans Board* v *Chee Hoi Voon*,[2] respectfully follow the decision of the Singapore Court of Appeal in *Savena Supramaniam Pillay* v *Tan Kah Chiat, Administrator of Tan Kong Liang*[1] and hold that when a plaintiff sues a defendant and has entered up a default judgment against him simpliciter the court cannot by the slip rule amend it to a form of judgment de bonis testatoris. I therefore confirmed in open court my decision in chambers in dismissing with costs the plaintiff's appeal against the order of the senior assistant registrar made on 25 January 1985.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co; Skrine & Co.*

Reported by *Mathavan Devadas*